JUDICIAL COUNCIL OF THE FIRST CIRCUIT

IN RE COMPLAINTS NOS. 01-08-90012 and 01-08-90013

BEFORE Lynch, Chief Circuit Judge

ORDER ENTERED: JULY 29, 2008

On May 20, 2008, complainant, a pro se litigant, filed a complaint of judicial misconduct under 28 U.S.C. § 351(a) against a district judge (No. 01-08-90012) and a chief district judge (No. 01-08-90013) in the First Circuit. The complainant alleges that the district judge engaged in misconduct while presiding over the complainant's civil action against a municipality, a state court judge, the complainant's prior attorney, and others. The federal suit alleged civil rights violations in connection with the complainant's previous state court action for property damage arising from a flood on the complainant's property. The complainant includes charges of wrongdoing against the chief district judge for failing to adequately address the complainant's allegations of misconduct by the presiding judge, as well as numerous charges against court staff for falsifying and mishandling court records.

The complainant presents a barrage of allegations of judicial malfeasance, deceit, fraud and judicial conspiracy which he asserts was intended to subvert the success of the complainant's litigation and allow floods to continue "to plague [the complainant's] neighborhood," in violation of

federal law and the Code of Conduct for U.S. Judges. Included in the alleged conspiracy are the district judge, the chief district judge, court staff, and the defendants in both the complainant's state and federal court cases. As part of the alleged conspiracy, the complainant asserts that the presiding judge and the co-conspirators "criminally alter[ed]" court records, including an executed summons served on the city which, the complainant contends, "is a fraudulent entry fabricated to dismiss complainant's case," and oppositions to two of the complainant's motions (which allegedly contain a "fraudulent certificate of service" that the presiding judge "refused to correct ").

The complainant also asserts that the presiding judge and the court reporter criminally altered the transcript of a motion hearing held in June 2007, contending that there are "contextual problems" in two spots where certain statements (in which the complainant allegedly requested sanctions against the attorney defendants) have been omitted. As a result, the complainant charges on his complaint of judicial misconduct that the record forwarded to the court of appeals was fraudulent and this court, through its clerk, "acted without jurisdiction . . . to deny complainant justice . . . " when it dismissed the appeal of the complainant's district court case.

The complainant continues that, by refusing to enter a default judgment against the defendants, the presiding judge violated "Judicial Canon 2" requiring judicial compliance with the law. The complainant states that, since the defendants were served properly and failed to file an answer by February 2007, entrance of a default judgment was required. Instead, the complainant contends that the judge improperly dismissed his case, stating that the complainant "could not possibly prevail at trial," despite witness testimony that "irrefutable evidence of Nuisance [sic] and Neglect [sic] was presented at [the state court] trial."

The complainant further contends that the presiding judge "acted as a lawyer" for the defendants, "lied from the bench to cover up [the city's] faulty drainage system and [to] undermine

[the complainant's] motion for injunction." These charges apparently emanate from the June 2007 motion hearing, supra, at which the complainant alleges that "[the presiding judge] stifled [his] presentation of evidence" by falsely stating that "there was 'no public safety issue' before [the court]." The complainant maintains that this was "a prejudicial and malicious statement" that constituted a violation of "Judicial Canon 3C(1)(d)(ii)."

The complainant also takes issue with the presiding judge's alleged statement that the complainant made "stratospheric accusations." The complainant explains that his charges were not "stratospheric' but [were] firmly based in physical, documentary and testimonial evidence," and that the presiding judge "fabricated reasons to dismiss [the complainant's] case [in order] to aid [the] . . . defendants."

In support of these charges, the complainant submits affidavits of four persons, three of whom identified themselves as "court watchers [who] exist solely as a response to judicial corruption..." These identified individuals state that they attended the June 2007 hearing. The fourth affidavit was submitted by a member of the coalition "founded in 1999 to end the flooding ... on [the complainant's s]treet," who was also reportedly present at the relevant hearing. The affidavits include statements indicating that the presiding judge: interrupted the complainant during the hearing; stated, in reference to the defendant state court judge, "[i]f he had his robes on, he is immune"; stated that the court would "expedite" its ruling on the complainant's motion for an injunction; "talked down" to the complainant; in response to the complainant's request for assistance as a pro se litigant, told the complainant that "he was hardly a novice"; and allowed a witness to appear, despite his failure to provide adequate notice to the complainant.

The complainant next charges that the presiding judge violated Canon 3B(3) when the court

failed to report "unprofessional attorney conduct" by one of the defendants—an attorney who allegedly stole the relevant drainage system map during the state court trial—and "allowed the theft of material evidence." Instead, the complainant asserts that—the presiding judge wrongfully determined that the oaths of office undertaken by the defendants were "irrelevant to the case," and that one of the defendants, a lawyer, was not a "state actor" who could be held accountable for the complainant's civil rights violations.

The complainant also contends that the presiding judge unreasonably and deliberately delayed for more than a year in issuing rulings, thereby perpetuating the public safety issue posed by the floods. The complainant asserts that the court, thereby, violated court rules which he contends require motions to be decided within two weeks and Judicial Canons requiring the "prompt" disposition of court business. The complainant concludes that the presiding judge aided and abetted the defendants, violated the complainant's legal and constitutional rights by "maliciously dismiss[ing the complainant's] case while corrupting the judicial process."

Finally, the complainant alleges that the presiding judge conspired with a former spouse, "to deny complainant civil redress." The complainant references a ruling issued in 1998 in an unrelated state court civil case by the former spouse, a state court judge, denying the complainant's motion for relief from judgment.

As to the chief district judge, the complainant contends that the judge committed misconduct when he failed to address the delays and improprieties of the presiding judge in connection with the case. The complainant cites a letter he wrote to the chief district judge, filed with the court in April 2007, requesting the chief judge's assistance. The complainant argues that the chief district judge's response--referring the complainant to the judicial misconduct complaint process, which he has now undertaken--did not "excuse [the chief judge] for allowing 'crimes against the U.S. government'

under color of law to continue "

A review of the complainant's underlying complaint filed in the federal district court, docket, relevant pleadings, transcripts, and court orders indicates that the complainant filed the case in October 2006 against a state court judge, the town, a private company that supplied pipes and materials to the town (water supply company), several attorneys, and other city and state officials, alleging civil rights violations in connection with the complainant's underlying state court case. The complainant filed an amended federal complaint in December 2006, and two of the defendants—the water supply company and one of the attorneys—filed motions to dismiss, in January 2007. The returned summonses were filed, and the complainant filed a motion for default judgment, as well as a motion for injunctive relief, in early April 2007.

The motion for a default was filed against those defendants who had so far failed to file a responsive pleading. The request for an injunction asked the court to require the city to correct the faulty drainage system that had produced floods on his property since 1994, floods which the complainant argued had been wrongfully ignored by the defendant judge who had issued a directed verdict, "based on fraud, perjury and the destruction, alteration and concealment of the public record."

In late April 2007, the complainant filed the letter referenced in the complaint to the chief district judge and others complaining about the alleged delay in the court's handling of the complainant's motions of early April 2007. In May 2007, the complainant filed further pleadings, including an exparte motion to expedite the court's rulings on his pending motions, motions for extensions of time, and oppositions to the motions to dismiss.

In June 2007, the court held the motion hearing cited in the complaint, after which the judge

took the pending motions under advisement. Two days after the hearing, the remaining defendants filed pleadings, including oppositions to the complainant's motions for default and injunctive relief, as well as motions to dismiss, to which the complainant responded. Also during June 2007, the complainant filed a "motion to end corruption and correct [the] docket" in which the complainant first presented many of the same charges raised in the present complaint, including "judicial treason" in connection with the presiding judge's alleged support of the state court judge at the motion hearing, and a "blatant conspiracy to deny [the complainant] justice" and conceal the defendants' crimes.

In July 2007, the presiding judge issued a 17-page memorandum and order in which the court summarized the factual background and the complainant's allegations, allowed the water supply company's motion to dismiss (as precluded by the state court resolution of the identical issues of negligence and nuisance), and allowed the motions to dismiss of the complainant's previous attorney, counsel for the water supply company, and the president of the company (as they were not "state actors" as required for the federal claims and declining to exercise jurisdiction over the pendant state claims).

In response to the complainant's motion for default, the presiding judge set forth the parameters for proper service on the city and its officials, and denied the motion for failure to demonstrate proper service. The court dismissed the case against the state court judge, explaining that he is immune for the conduct that precipitated the claim--issuance of the directed verdict. Reasoning that the state defendants too were immune under the Eleventh Amendment, the court also dismissed the case against them. The presiding judge also denied the complainant's motion for an injunction (for improper service and absence of federal jurisdiction). In response to the charges of

impropriety presented in the complainant's "motion to end corruption," the court reiterated its explanation of judicial immunity, ensured the accuracy of the docket, and denied the motion as moot. As a result, the complainant had 14 days in which to execute proper service on the remaining defendants.

In August 2007, the complainant appealed and sought additional time in which to respond to the district court's order--a motion which the presiding judge allowed. Thereafter, the complainant filed a motion for relief from judgment, to which the defendants responded in early September 2007. Also in September, the complainant filed a "motion for special relief for chief judge to remove [the presiding judge]," which included the charges of intentional delay, suppression of evidence, manipulation of the record, bias, and conflict of interest raised in the present matter. The presiding judge declined to rule on the pending motions until authorized to do so by the court of appeals.

In October 2007, the Court of Appeals dismissed the majority of the complainant's claims as premature (except for the denial of the request for injunctive relief). This order was not recorded on the district court docket and, as a result, apparently did not come to the presiding judge's attention until the appeals court entered a subsequent order in December 2007.

In December 2007, the chief district judge entered an order in response to the complainant's motion for special relief referring the motion to the presiding judge, insofar as it sought relief in the case, and referring it to the Chief Judge of the First Circuit, "[t]o the extent that it allege[d] judicial misconduct" The presiding judge promptly ruled on the complainant's pending motions, except for the two motions for "special relief," which the court deemed would be "more properly addressed by the Court of Appeals."

Thereafter, in March 2008, the complainant filed multiple pleadings, each entitled "Certificate of Non Response/Dishonor with Opportunity to Cure," which, although unclear, apparently sought some response from the presiding judge, the chief district judge, and the clerk's office staff involved with the complainant's case. In April 2008, the complainant filed "Notice[s] of Default" directed to these same parties, and additional motions in June 2008 (two for special relief and one for the presiding judge's recusal), which remain pending.

The complaint is baseless. The thoroughly reviewed record of the case provides no factual support for the complainant's broad charges of judicial conspiracy and bias. To the contrary, the record demonstrates the presiding judge's patient review of the complainant's many allegations. The lengthy transcript of the June 2007 hearing, on which the majority of the complainant's claims of bias, conspiracy and criminal conduct are based, depicts the judge's repeated attempts to solicit the facts underlying the complainant's legal claims. In addition to allowing the complainant extensive time in which to argue his claims and to file documents during the hearing¹, the court repeatedly explained its reasoning on pending issues (such as allowing the defendants the opportunity to oppose the motion for default), and, at times, went out of its way to explain to the defendants the complainant's concerns. See, e.g., "[Y]ou know what he means. He means the jury didn't get a chance to decide the case. That's what he's complaining about."

The complainant's statements and those of the "court watchers" are not, in any relevant respect, inconsistent with the transcript. The transcript shows no impropriety or judicial misconduct.

The judge referred to the complainant's broad assertions of crimes and conspiracy as "stratospheric,"

¹The complainant's unrestricted arguments comprise roughly one-quarter of the over 40-page transcript.

and, in response to the complainant's assertion of inexperience, the court stated that the complainant is "not a novice." The court also dismissed the complainant's attempts to raise issues of "public safety," explaining that the public was not a party to the case. ("You are talking about things that have nothing to do with the lawsuit. You are the plaintiff, not the 'good people of . . . Street.'") One alleged statement -- "[i]f he had his robes on, he is immune" -- is not apparent in the transcript but is also not suggestive of wrongdoing by the judge.²

There is nothing in the complaint, the relevant transcript, the court's memorandum of decision, or the rest of the reviewed record, that remotely indicates that the presiding judge sought to "stifle" the complainant's presentation of evidence, acted as the "attorney for the defendants," or engaged in fraud, conspiracy, or other criminal activity, as alleged. Accordingly, the charges to that effect are dismissed pursuant to 28 U.S.C. § 352(b)(1)(B), and Rules of Judicial Misconduct, Rule 11(c)(1)(D).

The related allegations that the transcript itself evidences some "contextual" problem that demonstrates that it was "criminally altered" by the judge is presented without any basis in fact, as are the claims that the judge manipulated other portions of the docket, such as the summons, or was responsible for fraudulent certificates of service filed with the court. See 28 U.S.C. § 352(b)(1)(A)(iii), and Rules of Judicial Misconduct, Rule 11(c)(1)(C). Furthermore, while the materials provide no evidence that clerk's office staff mishandled the record, if any such clerical error (or malfeasance) existed, it would not be attributable to the judge. See Boudin, C.C.J., Amended Order, In Re: Complaint No. 406, September 9, 2005, at 3. Moreover, while the judicial

²The affidavits indicate that this statement was made as the judge was exiting the courtroom; it is possible that it was made off the record. Regardless, as indicated, infra, a clerical or transcription error would not be indicative of judicial misconduct.

misconduct statute does not offer an avenue for addressing allegations of clerical impropriety, see Rules of Judicial Misconduct, Rule 4, there is no information in the reviewed record suggesting that staff of either the district court or the court of appeals engaged in wrongdoing in connection with the complainant's case or its appeal.

Nor did the fact that the presiding judge's former spouse had, many years earlier, presided over an unrelated civil case filed by the complainant in state court indicate a conflict of interest or necessitate the presiding judge's withdrawal from the present action. This is so especially where, as here, there is no indication that the presiding judge knew that the former spouse had presided over another of the complainant's cases. See Code of Conduct for United States Judges, Canon 3C. (Further, a violation of the Code of Conduct does not automatically constitute a violation of the judicial misconduct statute. See Rules of Judicial Misconduct, Commentary on Rule 3.)

Despite the complainant's conclusions to the contrary, the statements made by the presiding judge during the course of the motion hearing are also not, on the present facts, indicative of judicial misconduct. See 28 U.S.C. § 352(b)(1)(A)(i), and Rules of Judicial Misconduct, Rule 11(c)(1)(A). Assuming, arguendo, that the presiding judge "talked down" to the complainant during the lengthy hearing, appeared "annoyed," or otherwise exhibited a frustrated tone of some kind, that, alone, would not be suggestive of judicial misconduct. See Boudin, C.C.J., Order, In Re: Complaint No. 444, January 23, 2007, at 3-4 ("It is well settled that judges are entitled to form views about the merits, and to express them during the course of the case so long as the judgments rest on the evidence and arguments in the proceeding itself [A]bsent extraordinary circumstances, the tone maintained by the judge during a proceeding is not a basis for a finding of misconduct.").

Absent evidence of illicit judicial motivation--of which there is none--the complainant's

disagreement with the substance of any of the court's orders does not support a cognizable claim of judicial misconduct. See 28 U.S.C. § 352(b)(1)(A)(ii), and Rules of Judicial Misconduct, Rule 11(c)(1)(B). See also Rules of Judicial Misconduct, Rule 3(h)(3)(A) ("Cognizable misconduct... does not include... [a]n allegation that calls into question the correctness of a judge's ruling.")

Nor does the record support the claim of improper delay where, as here, there is no indication of improper motive, and the judge acted reasonably promptly on all matters before the court.³ See Rules of Judicial Misconduct, Rule 3(h)(3)(B).

Finally, there is no evidence of wrongdoing by the chief district judge who appropriately referred the charges of judicial misconduct against the presiding judge to the chief circuit judge, the party responsible for addressing such claims. See 28 U.S.C. § 351, et. seq. Accordingly, the charges against the chief district judge are dismissed as unfounded. See 28 U.S.C. § 352(b)(1)(A)(iii), and Rules of Judicial Misconduct, Rule 11(c)(1)(C).

For the reasons stated, Judicial Misconduct Complaints Nos. 01-08-90012 and 01-08-90013 are dismissed, pursuant to 28 U.S.C. §§ 352(b)(1)(A)(i), 352(b)(1)(A)(ii), 352(b)(1)(A)(ii), and 352(b)(1)(B)

7/29/09

Date

Chief Judge Lynch

³Contrary to the complainant's assertion, as a general matter, procedural rules do not require the court to rule on motions within a specified period of time.